

Ostrov v Rozbruch

2010 NY Slip Op 33754(U)

July 12, 2010

Supreme Court, New York County

Docket Number: 116707/2006

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

~~PART~~ PART 16

Index Number : 116707/2006

OSTROV, DEBORAH

VS.

ROZBRUCH, JACOB M.D.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for summary* judgment by defendant *Beth Israel* Medical Center is granted in accordance with the accompanying memorandum decision.

FILED

JUL 21 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: JUL 12 2010

Alice Schlesinger

ALICE SCHLESINGER *c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
DEBORAH OSTROV,

Plaintiff,

-against-

JACOB ROZBRUCH, M.D., and BETH ISRAEL
MEDICAL CENTER,

Defendants

FILED

Index No. 116707/06
Motion Seq. Nos. 002
and 003

JUL 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

SCHLESINGER, J.:

In this medical malpractice action, the plaintiff Deborah Ostrov has brought suit against her orthopedic surgeon, Dr. Jacob Rozbruch, for a left knee replacement performed on June 7, 2004. She has also sued Beth Israel Medical Center, where Dr. Rozbruch performed this surgery. All discovery has been completed, and both defendants have moved for summary judgment.

At oral argument held on July 7, 2010, I indicated that the moving papers by Dr. Rozbruch, consisting of multiple affirmations from Dr. Donald Rich, an orthopedist, Dr. Larry Scher, a surgeon who specialized in vascular matters, Dr. Leonard Raifman, Ms. Ostrov's primary care physician for 30 years, and Dr. Andrew Turtel, her treating orthopedist, made out a prima facie case on behalf of the doctor to the effect that he had not departed from accepted medical/surgical care in his treatment of the plaintiff.

Because of this finding, I further noted that the burden then shifted to the plaintiff to show that legitimate factual issues existed sufficient to deny the motion. In that regard, I pointed out, without objection from plaintiff's counsel, that the opposing affirmation from plaintiff's expert orthopedist did not take issue with any part of the surgical procedure or subsequent care.

However, the expert opined (at ¶48) that Dr. Rozbruch had departed from accepted medical care by performing the left knee replacement at all; in other words, the surgery was contraindicated. He based his opinion on:

the totality of Ms. Ostrov's prior orthopedic and medical history, which included numerous problems with persistent lower left extremity edema/swelling; two instances of post-operative deep vein thrombosis; left leg numbness following the prior left hip replacement and evaluated subsequent to right knee replacement; a long-standing diagnosis of chronic venous insufficiency documented by Dr. Haveson as early as 1999, as well as multiple problems specific to the left foot and toes, i.e., full thickness pressure sore of the left heel and severe hallux valgus.

This doctor also opined that it was a departure for Dr. Rozbruch to have proceeded without clearance from a vascular surgeon in the face of Ms. Ostrov's severe vascular disease. She had been cleared by her primary care physician Dr. Raifman.

Finally, in connection with a cause of action sounding in informed consent, the doctor opined that Dr. Rozbruch had failed to discuss more conservative alternatives with Ms. Ostrov, such as steroid injections, had failed to have her appreciate the effects the surgery would have on her gait in light of the problems she was already experiencing with her gait, and had generally failed to do a fresh reevaluation of Ms. Ostrov's need for surgery after learning of treatment she had received shortly before the scheduled surgery for left foot problems. This orthopedist states that these failures and departures were responsible for the plaintiff's permanent left knee and related injuries.¹

¹It should be noted that the moving doctor's position, via his experts, is that the plaintiff's continuing problems are the result of her underlying chronic, documented venous insufficiency and lymphedema, not because of any negligence by Dr Rozbruch.

In reply, counsel for the defendant doctor argues that these alleged departures were never mentioned before. To the extent that the word "contraindicated" was never used, he is correct. However, there are implicit references to these departures and, as noted at oral argument, in paragraph 7 of the affidavit from the orthopedist Dr. James R. Dickson, presented by Beth Israel in its moving papers before the plaintiff filed her opposition, Dr. Dickson dismisses as a "red herring" the idea that the plaintiff's venous insufficiencies before surgery (i.e., her "prior condition") gave her an "elevated index" for injury. This statement suggests that there was anticipation of such a claim. Nonetheless, I do find that the defense position in its reply that they were never explicitly on notice of these claims does have some merit.

However, what concerns the Court more is the limited discussion by the plaintiff's expert as to why this precise surgical procedure, the total left knee replacement, was contraindicated in light of the plaintiff's history and clinical picture and also as to the mechanism of the injury. With regard to the latter, there is lacking in specifics how or why Ms. Ostrov's left leg deteriorated to the extent it allegedly did as a result of the left knee replacement.

It could be argued, and counsel for Dr. Rozbruch did vigorously argue, that these omissions should result in my granting Dr. Rozbruch's motion. However, since I find that the medicine here is complicated and that all the physicians heard from are unclear as to precisely what happened in terms of the result, I believe the better practice would be to learn more. The procedure which I will direct will also give the defense an opportunity to focus in on the claimed departures about which they now explicitly have notice.

Therefore, I am directing both sides to submit supplemental expert affirmations to clarify the medical opinions asserted by the respective parties so this Court can better understand the complex medical issues and determine whether issues of fact truly exist. Neither counsel is limited to further elaboration from the experts already heard from. Since this is summertime when physicians and others are often away, I am giving plaintiff until September 10, 2010 to submit their supplemental papers, and the defendant can have until October 8, 2010.

As for Beth Israel Medical Center, its motion for summary judgment is granted and all causes of action against it are dismissed. The claims against Dr. Rozbruch are personal to him. No one could seriously argue, nor do I believe plaintiff really does, that Dr. Rozbruch's actions were so obviously egregious as to have compelled the hospital to intervene between this private physician and his patient. No other, separate departures are alleged against Beth Israel.

Accordingly, it is hereby

ORDERED that the motion by defendant Beth Israel Medical Center (sequence 003) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of defendant Beth Israel Medical Center; and it is further

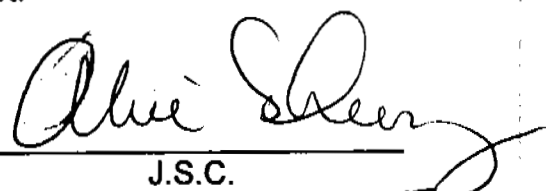
ORDERED that the action is severed and continued against the remaining defendant Jacob Rozbruch, M.D.; and it is further

ORDERED that Dr. Rozbruch's motion for summary judgment (sequence 002) is held in abeyance pending the submission of further papers as specified herein.

This constitutes the decision and order of this Court.

Dated: July 12, 2010

JUL 12 2010



J.S.C.
ALICE SCHLESINGER

FILED
JUL 21 2010
NEW YORK
COUNTY CLERK'S OFFICE